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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 306

ALFRED COOKMAN MINER, INDIVIDUALLY AND AS SUCCESSOR TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF JULIA A. MINER, DECEASED, PETITIONER

v.

RECONSTRUCTION FINANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The District Court did not write an opinion (R. 54–55). The opinion of the Circuit Court of Appeals (R. 120–124) is reported in 128 F. (2d) 242.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 18, 1942 (R. 125). The peti-

tion for a writ of certiorari was filed August 14, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the liability of the stockholders of the Central Republic Trust Company to a creditor is the same as the liability of that bank to that creditor.

2. Whether the petitioner, as a creditor of the Central Republic Trust Company, was bound by a final decree entered in the Circuit Court of Cook County, Illinois, on August 18, 1939, in a suit in which the petitioner and the bank were parties, and the liability of the bank for the acts and omissions complained of was determined to be the sum of $25,000.

CONSTITUTIONAL PROVISION INVOLVED

Section 6 of Article XI of the Constitution of Illinois, which provides for the liability of stockholders of Illinois banks to the creditors of banks, reads as follows:

> Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors, over and above the amount of stock by him or her held, to an amount equal to his or her respective shares so held, for all its liabilities accruing while he or she remains such stockholder.

STATEMENT

Reconstruction Finance Corporation brought suit on behalf of itself and all other creditors of the Central Republic Trust Company, of Chicago, to enforce the liability of stockholders of that bank to its creditors provided for in Section 6 of Article XI of the Illinois Constitution. Decrees entered against the stockholders were affirmed by the Circuit Court of Appeals for the Seventh Circuit in *Reconstruction Finance Corporation* v. *McCormick,* 102 F. (2d) 305, certiorari denied, 308 U. S. 558. Orders were then entered giving creditors of the bank leave to file their claims. The petitioner filed the claim here involved on February 21, 1938 (R. 6).

Prior to 1933 the bank had been trustee of the estate established by the will of petitioner's mother. On April 3, 1933, the bank filed a bill of complaint in the Circuit Court of Cook County, Illinois, requesting the appointment of a successor trustee to itself. On November 10, 1933, that court appointed petitioner as successor trustee and reserved jurisdiction for settlement of the accounts of the bank as trustee (R. 115). In that action, petitioner filed a cross bill against the bank based upon the same claim that was filed by him in the case at bar (R. 33). On August 18, 1939, the Circuit Court of Cook County entered a final decree (R. 32–39), which found that the bank had violated its trust in one of the in-

stances alleged, entitling petitioner to damages in the sum of $25,000, but that the bank was not otherwise liable, and directed that petitioner file a claim for such amount in the liquidation proceedings of the bank then also pending in the Circuit Court of Cook County (R. 36–39).[1] This decree contained no reference to or reservation of petitioner's rights against the bank's stockholders in the present proceeding, then pending in the federal district court.

Thereafter, in the suit for the liquidation of the bank, an order was entered on April 13, 1940, allowing petitioner's claim for $25,000 against the bank (R. 39–43). In that order (which was

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[1] The decree provides that—

"Said action and failures to act, and particularly the refusal of said Trustee to accept certain offers to purchase the so-called Ainslie Street property, were breaches of trust on the part of said Trustee, and, after the allowance of all proper credits, charges and offsets to said Trustee, resulted in a net loss to said trust estate in the sum of $25,000, with which said sum the accounts of said Trustee should be charged. * * * Except for the breaches of trust in said cross-bill and objections more particularly described, the actions of said Central Republic Trust Company and of its corporate predecessor, as Trustee, and its failures to act, were in every way proper and justified, and objections numbered 1, 2, 14 and 18, in part, should be overruled. Said Trustee and said Receivers, except as in this paragraph more particularly found, are under no liability to said trust estate or to any of the beneficiaries thereof or to any Successor Trustee heretofore or hereafter appointed for any of their acts and doings as Trustee or as Receiver, respectively, or in their individual capacities or for any failure to act whatsoever" (R. 36).

entered during the course of the hearings of the petitioner's claim before the Master in the present case), there also appears a provision reciting that the entry of the order was "without prejudice to any right" of petitioner to prosecute his claim for a larger amount against the stockholders in the case at bar (R. 43).

The petitioner's claim filed in the case at bar on February 21, 1938, (R. 6) was referred to a Master, who ruled that the final decree of August 18, 1939, had limited the liability of both the bank and its stockholders to $25,000 (R. 44–49). Petitioner filed objections and exceptions to the Master's report (R. 53, 54) which were overruled by the District Court (R. 54, 55). The Circuit Court of Appeals affirmed the ruling of the District Court (R. 125).

ARGUMENT

1. Section 6 of Article XI of the Illinois Constitution makes the stockholders of a bank liable, to an amount equal to their investment, for "*its* liabilities" to "*its* creditors." The decree of August 18, 1939, determined that the bank was liable to petitioner for $25,000 and no more. The Illinois cases, construing the constitutional provision to mean what it says, hold that the liability of the stockholders is identical with and no greater than that of the bank. See *Sanders* v. *Merchants State Bank,* 349 Ill. 547, 564 (1932); *Schalucky* v. *Field*, 124 Ill. 617 (1888).

Petitioner attempts to avoid the conclusion that the stockholders' liability was no greater than that of the bank by reliance on the reservation of rights against the stockholders in the subsequent order of April 13, 1940. But that order could not have enlarged the liability of the stockholders, which was the same as that of the bank. Since the liability of the bank had previously and finally been decreed to be only $25,000, the stockholders could not be liable for a greater amount. The ruling of the court below to this effect was clearly correct.

2. Petitioner argues that the court below relied on overruled Illinois decisions when it said that "a release of one person releases the other in spite of any attempted reservation of rights against the other partners" (R. 124). This statement was unnecessary to the decision, and this Court, on review, would not be called upon to decide whether it was correct. Even if the reservation of rights were effective as against the stockholders, for reasons set forth above the prior determination of the bank's liability in the final decree of August 18, 1939, left petitioner with no rights to preserve. Petitioner's extended analysis (Br. 7–16) of the Illinois law as to the effect of such a reservation is thus entirely irrelevant.[2]

[2] Petitioner seems to believe that the decree of August 18, 1939, did not deprive it of rights against the stockholders for damages in excess of $25,000, because of recitals in the order to April 13, 1940, that the parties to the first proceeding had

3. Petitioner's argument that the decision below denied full faith and credit to the order of the Illinois court disregards the "final decree" entered by that court on August 18, 1939. Since the court below placed its decision squarely upon this ruling of the state court, the contention is plainly without substance.

4. At the close of his brief (pp. 18–19), petitioner implies that the respondent improperly opposed Miner's claim. The respondent has an interest in the outcome of this action because it will share as a creditor in the distribution of the fund collected from stockholders of the bank. The respondent, as a creditor, has the right to contest the amount of the petitioner's claim. *Richmond* v. *Irons*, 121 U. S. 27, 53. The respondent, as the plaintiff in the stockholders' liability suit, has the right and duty to protect not only its rights but the rights of all creditors by taking every step which is necessary to insure that the creditors' claims shall be allowed only in the proper amounts.

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agreed that the findings were to be without prejudice (R. 41–42). But whatever the parties agreed to was merged into the final decree, which affirmatively limits the bank's liability and contains no such reservation. Furthermore, the testimony cited by petitioner for the existence of such an oral agreement changing the terms of the so-called consent decree (R. 23–25) gives little support to the contention that such an agreement was made.

CONCLUSION

The decision below is correct. It is not in conflict with the decisions of the courts of Illinois which control in the present case. No question of public importance is presented. It is, therefore, respectfully submitted that the petition should be denied.

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ALFRED COOKMAN MINER, INDIVIDUALLY AND AS SUCCESSOR TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF JULIA A. MINER, DECEASED,

Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION,

Respondent.

PETITION FOR RECONSIDERATION OF DENIAL OF APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR RECONSIDERATION OF DENIAL OF APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

Petitioner, Alfred Cookman Miner, individually and as Successor Trustee under the Last Will and Testament of Julia A. Miner, Deceased, prays this court to reconsider its denial of his original petition for writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Counsel for respondent tacitly concede that the court below has erroneously decided a question of Illinois law.

The contention is made that the ruling was unnecessary to its decision, but a reference to the opinion clearly indicates that far from being unnecessary to the decision the principle announced by the court is, in fact, the *ratio decidendi* of the case.

Counsel for respondent urge that "since the liability of the bank had previously and finally been decreed to be only $25,000.00, the stockholders could not be liable for a greater amount." The difficulty with this statement is that respondent confuses the amount of the liability of the bank with the amount for which the liability of the bank was compromised. It should be apparent that the latter would, in the very nature of things, be smaller than the former, else the decree would be one not of compromise but of payment.

No authority is stated by respondent for its contention that the decree of August 18, 1939, was final. The decree is so labeled but was not in fact or in Illinois law final. The decree by its very terms did not conclude the matter before the court but referred the case for final conclusion to the liquidating suit brought by the Auditor of Public Accounts to wind up the affairs of the bank. Under the law of Illinois as expressly stated by the Circuit Court of Appeals, it is the order allowing the claim of that court which is the final order in this case (Tr. 123). That order was entered April 13, 1940, and it is by that order that petitioner's claim has been preserved. If there is any conflict in terms between the two orders, the later in point of time controls. (*Bank of Montreal* v. *Griffin*, 190 Ill. App. 221; Cert. den. 191 Ill. App. XIII.) The Circuit Court of Appeals rejected the contention advanced by respondent that petitioner's rights are to be read solely in the light of the terms of the order of August 18, 1939. The court itself expressly stated that whether it considered both orders or only the subsequent order of April 13, 1940, the petitioner is entitled to no

recovery, since the release of one person jointly liable releases all others (Tr. 123-4).

The order allowing petitioner's claim in the liquidation proceeding constituted a final adjudication. (*Albers* v. *Blue Island Trust & Savings Bank*, 301 Ill. App. 398; *People* v. *Farmers & Merchants State Bank*, 281 Ill. App. 354.) The court entrusted with the liquidation of the bank's affairs was the only court having jurisdiction of the subject-matter. (*People* v. *Ottawa B. & T. Co.*, 287 Ill. App. 499, 5 N. E. (2d) 275.) As to the previous decree, the court found:

> "No proof was offered or made in said cause as to the extent of damages incurred by the trust estate created under the Last Will and Testament of Julia A. Miner, Deceased, by reason of the aforesaid breaches of trust, but it was agreed by the parties to said cause that the court might allow a claim for $25,000.00 to be paid in due course of administration upon a parity with claims of a like character and preference out of the assets then or thereafter to come into the hands of the said receiver, the allowance of said claim to be a full and complete release of all claims and rights of said Alfred Cookman Miner, as Trustee, and of all persons interested in said trust estate against Central Republic Trust Company, as Trustee and individually, and against Charles H. Albers, as Receiver and individually; it being further agreed that said findings should be without prejudice to any right of Alfred Cookman Miner, as Successor Trustee under the Last Will and Testament of Julia A. Miner, Deceased, to continue to prosecute a claim for a larger amount theretofore filed by him in case No. 14189 pending in the District Court of the United States for the Northern District of Illinois, Eastern Division, entitled 'Reconstruction Finance Corporation, etc., *vs.* Central Republic Trust Company, etc., *et al.*'; and that said decree should be without prejudice to any right of the said Alfred Cookman Miner to establish and prove further and additional claims

for damages arising out of the administration of the trust herein by the Central Trust Company and the Central Republic Bank and Trust Company against the stockholders of said companies." (Tr. 41-42.)

It thereupon ordered as follows:

"It Is Further Ordered, Adjudged, and Decreed that the entry of this order shall be without prejudice to any right of Alfred Cookman Miner to prosecute claims which the said Alfred Cookman Miner has already asserted in cause No. 14189 in the United States District Court for the Northern District of Illinois, Eastern Division, being the cause entitled, 'Reconstruction Finance Corporation, etc. *vs.* Central Republic Trust Company, etc., *et al.*,' but the fixing of said claim in the amount of Twenty Five Thousand ($25,000.00) Dollars shall not be deemed an adjudication of the extent of damages suffered by the trust estate but a determination for the sole purpose of settling the extent of participation by the said trust estate in the assets now or hereafter to come into the hands of the said receiver in this cause." (Tr. 43.)

The Circuit Court of Appeals rejected the foregoing terms of the order of the Circuit Court for the reason and only for the reason that "such release of the bank also released the stockholders from all damages above that amount, regardless of the attempted reservation of the right to recover a greater amount from the stockholders." In this the court was in error, as was conclusively established in petitioner's original brief and as conceded by counsel for respondent.

The only conceivable consideration upon which this court might refuse to consider petitioner's case is that of public interest. It is respectfully submitted that a clear misapplication and misstatement of Illinois law lying at the crux of this case is a matter of sufficient interest to merit this court's attention. Petitioner has been barred from asserting a right of recovery against stockholders

in the face of a solemn contrary agreement as set forth and approved by a court of competent jurisdiction having exclusive control of the subject-matter. Petitioner prays that this court may reconsider its action in denying petition for certiorari herein and order the writ to issue.

Respectfully submitted,

ALFRED COOKMAN MINER, individually and as Successor Trustee under the Last Will and Testament of Julia A. Miner, Deceased,
Petitioner,

GEORGE EDWARD LEONARD, JR.,
Counsel for Petitioner.

GEORGE EDWARD LEONARD, JR., certifies that the foregoing petition for reconsideration of this court's denial of petitioner's application for writ of certiorari is made in good faith and not for the purpose of delay.

GEORGE EDWARD LEONARD, JR.